(9)

No. 89-700

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP,

Petitioner,

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NATIONAL BAR ASSOCIATION AMICUS CURIAE IN SUPPORT OF PETITIONER

Of Counsel

ERROLL D. BROWN, ESQ.
CYNTHIA R. MABRY, ESQ.
LISA C. WILSON, ESQ.

NATIONAL BAR ASSOCIATION
1225 Eleventh Street, N.W.
Washington, D.C. 20001

J. CLAY SMITH, JR.

Howard University School of Law
2900 Van Ness Street, N.W.
Washington, D.C. 20008
(202) 686-6559

Counsel of Record for the National Bar Association in Support of Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

38P

QUESTION PRESENTED

Whether the FCC's distress sale policy implemented under its enforcement authority and ratified by Congress in furtherance of a goal to increase minority ownership pursuant to a public interest mandate and diversity interest is constitutionally permissible when such enforcement authority and minority ownership policy benefits provide a dual benefit to both non-minorities and minorities.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

FCC Administrative Decisions, Policy Statements and Orders

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-700

ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP,

Petitioner,

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NATIONAL BAR ASSOCIATION AMICUS CURIAE IN SUPPORT OF PETITIONER

CONSENT OF THE PARTIES

Petitioner and Respondent have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

The National Bar Association was founded in 1925, and is an organization comprised of Black lawyers across the United States. Since its founding, the National Bar Association has been involved in promoting

civil rights activities in an effort to improve the educational, societal, and economic welfare of Black and other disadvantaged Americans. The National Bar Association has, for the last forty years, actively participated in the formation of the nation's telecommunications policy, particularly as it relates to promoting minority employment in and ownership of broadcast facilities.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case as presented by Petitioner.

SUMMARY OF THE ARGUMENT

This case involves a claim by Respondent challenging the authority of the Federal Communications Commission ("FCC") to impose sanctions on licensees who violate agency regulations, and its power to devise remedies that conform to its public interest mandate. The Respondent alleges that he has been discriminated against as a result of the FCC's enforcement action. Amicus believes that Respondent's claim, upheld by the District of Columbia Circuit, is inconsistent with, and in fact contrary to, the Court's pronouncements regarding the enforcement authority of legislative agencies. Respondent attempts to turn the FCC's enforcement policy "upside-down" by asserting a race-based claim which is unfounded and indeed diversionary to the Court's enforcement policy cases. Amicus submits that the text of the distress sale policy expresses a nexus with the FCC's enforcement authority in such an inextricable manner as to make the distress sale policy an extension of its enforcement authority, not subject to sweeping judicial review.

ARGUMENT

I. THE DISTRESS SALE POLICY IS AN EXTENSION OF THE FCC'S ENFORCEMENT AUTHORITY

When a licensee is found to have violated FCC rules, it can be subject to a revocation hearing to determine whether it may continue to serve as a licensee.[1] For those licensees who prefer not to engage in the revocation proceeding, the FCC adopted the "distress sale" policy which has since has been interpreted by FCC decisions. *See, e.g., Northland Television, Inc.*, 72 FCC 2d 51 (1979); *Street Broadcasting Corp.*, 47 RR 2d 350 (1980). The distress sale policy, adopted in 1978, allows licensees, subject to revocation hearing, to seek and request assignment of their license to a minority-owned or minority-controlled buyer,[2] so long as the sale price of station facilities

---

[1] *See Image Radio, Inc.*, 29 FCC 2d 822 (1971) (license renewal denied where station engaged in fraudulent billing and made false statements to Commission in connection with inquiries concerning the same); *L.G. Graves*, 11 FCC 2d 763 (Rev. Bd. 1968) (revocation of citizen's radio station license where licensee repeatedly and knowingly violated various FCC rules); *Weiner Broadcasting Co.*, 57 RR 2d 1679 (1985) (licensee subject to revocation proceeding where licensee committed numerous technical violations, identified the broadcast station with the call-letters of another station not licensed to the licensee, and had refused a Commission inspector access to the station).

[2] The FCC considers a minority-owned or controlled entity as one in which minority interest exceeds 50%, or is controlling. For limited partnerships, the general partner must be a member of a minority group and possess at least 20% of the ownership equity to qualify. *See Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d 849, 853 (1982).

amount to no more than 75% of the fair market value of the station. *See Grayson Enterprises, Inc.*, 77 FCC 2d 156, 164 (1980). Specifically, the FCC's distress sale policy reads:

> [The FCC] will permit licensees whose licenses have been designated for revocation hearing, or whose renewal applications have been designated for hearing on basic qualification issues, but before the hearing is initiated, to transfer or assign their licenses at a 'distress sale' price [footnote omitted] to applicants with a significant minority ownership interest, assuming the proposed assignee or transferee meets our other qualifications.

Statement of Policy on Minority of Broadcasting Facilities, 68 FCC 2d 979, 983 (1978) (*1978 Policy Statement*). The FCC's enforcement authority and its distress sale policy are linked. As demonstrated in the FCC's Clarification of the *1978 Policy Statement*. the distress sale policy is inextricably tied to its enforcement discretion. *See Clarification of Distress Sale Policy*, FCC 78-724, 44 RR 2d 479 (1978) (*Clarification*).[3]

Prior to the creation of the distress sale policy, the assignment of a license when there were unresolved character issues pending against the licensee always raised difficult enforcement questions at the FCC.[4] The FCC's general policy provides, in pertinent part:

---

[3] In the *Clarification, supra*, at 481, the FCC notes that the intent of the policy is to "further encourage minority ownership without adversely affecting the [agency's] interest in preserving its sanctions against misconduct."

[4] *See, e.g., Grayson Enterprises, Inc.*, 77 FCC 2d at 153.

> Action on applications to . . . acquire, either by assignment or transfer of control, existing facilities *will generally be deferred* where:
>
> • • •
>
> B. With respect to a prospective seller or an individual who has a controlling interest in the prospective seller there is:
>
> (1) A pending renewal, revocation or investigative proceeding involving the particular station which is sought to be sold.

Statement on Qualifications of Broadcast Licensees, 28 RR 2d 705 (1973)(*Statement*) (emphasis added). Notwithstanding the FCC's *Statement* announcing its policy against granting such transactions on a regular basis, Section 310(d) of the Communications Act calls for grant of the assignment request only "upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby." 47 U.S.C. Sec. 310(d). Accordingly, the *Statement* provides that the FCC is authorized to allow the grant of the assignment request pending the revocation proceeding only "[w]here we find that the public interest would be served by granting the application, such a grant would be made subject to the outcome of the pending proceeding. If such a [public interest] finding cannot be made, then the action on the application will be [deferred]." *Statement, supra*, 28 RR 2d at 706.[5] For example, an assignment and sale has been

---

[5] In applying this policy, the FCC has provided that its language in the *Statement* "does not preclude approval of a sale by a broadcaster facing a hearing on character issues, however, it clearly indicates that the agency will defer consideration of

approved in circumstances when the licensee is either bankrupt or physically or mentally disabled. When the renewal applicant has suffered from physical disability, which had either contributed to his alleged wrongdoing or caused the proposed hearing to be unusually burdensome for him, the FCC has exercised its equitable powers to allow the assignment or transfer of control of a license notwithstanding the existence of unresolved character issues against the licensee. *See Martin R. Karig*, 3 RR 2d 669 (1964) (permittee allowed to transfer control of construction permit because of physical disability even after Initial Decision to revoke permit on grounds of character qualifications). Likewise, the FCC has permitted such assignment in bankruptcy cases. Again, notwithstanding the pending issues concerning a licensee's character, the FCC has allowed the assignment when there was a showing that alleged wrongdoers would not benefit from the sale, or would derive only a minor benefit which is outweighed by the equities in favor of innocent creditors. *See Second Thursday Corporation*, 22 FCC 2d 515, 518-19 (1970), *recon. granted on other grounds*, 25 FCC 2d 112 (1970). In so doing, the FCC made a discretionary policy decision that a licensee's insolvency and the protection of innocent creditors required a careful *ad hoc* balancing of competing interests in determining whether or not the FCC should

the transaction if the agency cannot find it to be in the public interest." *Grayson Enterprises, Inc.*, 77 FCC 2d at 154. *Grayson* holds that the FCC has discretion, on a case-by-case basis, to permit a licensee in a revocation hearing to assign or transfer control of the license if the agency should find that the licensee's conduct falls within a zone which, in its discretion, it can justify the assignment or transfer of control as consistent with its public interest mandate.

authorize the assignment of a license in the face of the unresolved character issues. *See Erwin A. LaRose and Jimmy Lee Swaggert v. FCC*, 494 F.2d 1145, 1147-48 (D.C. Cir. 1974) (in evaluating a petition for assignment in bankruptcy context, FCC must assess both assignee's qualifications and public interest considerations). Moreover, the FCC has acknowledged that it has made such policy determinations based on its understanding of being "vested with a broad discretion in [its] choices of remedies and sanctions." *WMOZ Inc.*, 3 FCC 2d 637, 639 (1966) (citing *Loraine Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965)).

The prior explanation of cases and policy has been set forth to enable the Court to understand that the distress sale policy, is rooted in, essentially an extension of, and inextricably tied to, the FCC's enforcement authority to allow licensees to assign their license and sell station assets rather than risk losing the license in a revocation hearing in certain exceptional circumstances.[6]

II. THE SUPREME COURT HAS HISTORICALLY RECOGNIZED AND GIVEN CREDENCE TO AGENCY DISCRETION IN ITS ENFORCEMENT AUTHORITY

Generally, an agency's decision whether to enforce its own policies through its administrative enforce-

[6] The FCC has also used the term "Petition for Special Relief" in granting the assignment of a license and sale of station assets notwithstanding the existence of unresolved character issues against the licensee during a revocation proceeding. While the request by the licensee for special relief may be titled differently in the distress sale context, the procedure and analysis utilized for granting the assignment request to the licensee facing a revocation hearing in either case is the same.

ment processes is limited to the agency's discretion. The FCC itself is guided by Section 4(j) of the Communications Act of 1934, as amended (47 U.S.C. Sec. 154(j)), which grants the agency authority to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." The FCC's broad power to promulgate and enforce its own rules and policies has been acknowledged by the Court in *NBC v. CBS*, 319 U.S. 190 (1943), which presented a challenge to the FCC's enforcement regulations applicable to radio stations engaged in chain broadcasting. In holding that the FCC has authority to promulgate and enforce policies that deal directly with network practices found inimical to the public interest, Justice Frankfurter provided insight into the agency's broad authority to enforce its policies:

> We are asked to regard the Commission as a kind of traffic officer, policing the wavelengths to prevent stations from interfering with each other. But the [Communications] Act [of 1934] does not restrict the Commission to merely the supervision of the traffic. It put upon the Commission the burden of determining the composition of that traffic . . . [T]he Act gave the Commission not niggardly but expansive powers. It was given a mandate to encourage the larger and more effective use of radio in the public interest.

Id. at 215-16.

Likewise, in *FCC v. Schreiber*, 381 U.S. 279 (1965), Chief Justice Burger's majority opinion specifically cited the FCC's broad discretion to prescribe rules for specific investigations and to make *ad hoc* procedural rulings in specific instances. There he stated,

> [A]dministrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved.

Id. at 290.

In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Court dealt specifically with the issue of an agency's refusal to exercise its enforcement authority. Justice Rehnquist's majority opinion noted the "general unsuitability for judicial review of agency decisions to enforcement." *Id.* at 831.

> The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether the agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed whether the agency has enough resources to undertake the action at all. . . . *The agency is far better equipped than the court to deal with the many variables involved in the proper ordering of its priorities.* Similar concerns animate the principles of administrative law that courts generally defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.

Id. at 831-32 (emphasis added). Although the facts *sub judice* deal with an agency acting in accordance with its broad discretionary enforcement power, the analysis used in *Heckler, supra*, is instructive. Justice Rehnquist's majority opinion reaffirms that agencies, such as the FCC, are better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities in determining which entities shall be granted licenses. *See Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council*, 435 U.S. 519 (1978) (formulation of procedures is basically left within the discretion of agencies to which Congress has confided the responsibility for substantive judgments); *see also, FCC v. Schreiber*, 381 U.S. at 290 (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940)) (administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties). *Cf. United States v. Batchelder*, 442 U.S. 114, 124 (1979).

The Communications Act itself mandates that the FCC promulgate rules and regulations to ensure "the efficient use of the broadcast spectrum." Absent specific statutory guidelines to determine the definition of the "efficient use of the broadcast spectrum," the FCC is essentially left to its own devices as to how to pursue its public interest mandate. *United States v. Storer Broadcasting Co.*, 351 U.S. 182, 203 (1956). Reference is made to the above cases to demonstrate the Court's deference to agency discretion, particularly in the exercise of its enforcement authority. Amicus believes and here asserts that the court below mischaracterized the distress sale policy solely as a

minority ownership policy unrelated to the FCC's enforcement authority, and by doing so, overreached its authority. *See Shurberg Broadcasting of Hartford v. FCC*, 876 F.2d 902, 910-14, 926 (D.C. Cir.), *reh'g denied*, 876 F.2d 958 (1989). Stated differently, the Court cannot consistent with reason, apply its deference rules differently simply because an agency's enforcement authority is linked to a minority ownership policy, such as distress sales.

III. THE SUPREME COURT SHOULD DEFER TO THE FCC'S DETERMINATION WHEN THE AGENCY HAS CONSTRUED ITS PUBLIC INTEREST MANDATE AND HOW TO MEET THAT MANDATE AND WHEN CONGRESS HAS RATIFIED THE AGENCY'S DETERMINATION.

Respondent argues, in essence, that the Communications Act does not give the FCC the unbridled authority to use its enforcement powers to fulfill its public interest mandate. Specifically, Respondent objects to the use of the distress sale policy to achieve diversity of programming.

The legislative history of the Communications Act provides no single view about whether Congress intended the FCC to meet its public interest mandate in one particular way. The starting point for analyzing the FCC's actions in using the distress sale policy pursuant to its enforcement powers to achieve diversity of viewpoint is the analysis articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 167 U.S. 837 (1984). There, the Court stated:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as

> the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statue. . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 842-44.

There is ample legislative history to support the FCC's determination that minority ownership is a means to achieve diversity in programming and viewpoint. *See, e.g., Parity for Minorities in the Media—Hearing on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983); *Minority Participation in the Media—Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983); *Minority-Owned Broadcast Stations—Hearing on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. (1986).

A clearer indication of Congress' approval of the FCC's practice of using its minority ownership policy to meet its public interest mandate occurred in 1982.

Congress created a lottery, but mandated that minority enhancements for minority applicants be incorporated into any random selection licensing scheme. *See* Communications Amendments Act of 1982, Pub.L.No. 97-259, 96 Stat. 1087, 1094-95, codified at 47 U.S.C. Secs. 309(i)(3)(A) and (C)(ii). The legislative history of the lottery statute removed any remaining doubt as to Congressional approval of the FCC's use of its enforcement authority to achieve diversity of programming through minority ownership, and in particular, through the use of the distress sale policy. The House Report stated that "[t]he underlying policy objective of these preferences is to promote the diversification of media ownership and consequent diversification of program content." *See* H. Rep. No. 97-765 at 40. Congress explained that the reason for supporting structural means to increase diversity of the media was in the hope that this would "in turn broaden the nature and type of information and programming disseminated to the public." *Id.* at 43.

In revisiting the Communications Act, Congress did not change the minority ownership policy (including the distress sale provision) adopted by the FCC to achieve diversity of the media through increased minority ownership of the media. In the course of adopting the 1982 amendments, Congress considered in detail the minority ownership policy adopted by the FCC. Under these circumstances, it is a strong presumption that by reenacting without including any modification, Congress ratified the minority ownership policy adopted by the FCC. *See NLRB v. Gullett Gin Co.*, 340 U.S. 361, 365-66 (1951); *see also, Helvering v. R. J. Reynolds Co.*, 306 U.S. 110, 114-15

(1939); *Brewster v. Gage*, 280 U.S. 327, 337 (1930); *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 313-15 (1933). The failure to change the policies under which the FCC operated is significant, for a "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Young v. Community Nutrition Institute*, 476 U.S. 974, 983 (1986) (*citing NLRB v. Bell Aerospace, Co.*, 416 U.S. 267, 275 (1974); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457 (1978)).

In addition to the importance of legislative history, and in support of Amicus' position, a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. *NLRB v. Bell Aerospace Co.*, 415 U.S. at 274-75; *see also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965); *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965); *Norwegian Nitrogen Co. v. United States*, 288 U.S. at 315. This is particularly so where Congress has reenacted the statute without pertinent change. *Zemel v. Rusk*, 381 U.S. at 11-12; *Costanzo v. Tillinghast*, 287 U.S. 341, 345 (1932); *Commissioner v. Noel Estate*, 380 U.S. 678, 682 (1965); *NLRB v. Gullett Gin Co.*, 340 U.S. 365-66; *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. at 114-15; *Norwegian Nitrogen Co. v. United States*, 288 U.S. at 313. In the case at bar, the FCC has for nearly a decade construed the Communications Act to connote that diversity of programming could be achieved through minority ownership. Congress did not seek to alter the agency's interpretation of the statute when it amended the

statute to create the lottery scheme. "[T]he fact that [the Court] might not have made the same determination on the same facts does not warrant a substitution of judicial or administrative discretion since Congress had confided the problem to the latter." *CBS, Inc. v. FCC*, 453 U.S. 367, 394-95 (1981) (citing *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946)). "[C]ourts should not overrule an administrative decision merely because they disagree with its wisdom." *CBS, Inc. v. FCC*, 453 U.S. at 384 (citing *Radio Corp. of America v. United States*, 341 U.S. 412, 420 (1951)). The FCC must be allowed to "remain in a posture of flexibility to chart a workable 'middle course' in its quest to preserve a balance between the essential public accountability and the desired private control of the media." *CBS, Inc. v. FCC*, 453 U.S. at 390. Amicus posits that the FCC's interpretation of the statute to mean that diversity can be achieved through minority ownership is a constitutionally acceptable accommodation between, on the one hand, use of the agency's enforcement power, and, on the other hand, diversity of the effective and efficient programming through increased minority ownership in furtherance of the First Amendment. *See Associated Press v. United States*, 326 U.S. 1, 20 (1944).

The Supreme Court in previous decisions has recognized that subsequent legislation declaring the intent of an earlier statute is entitled to significant weight, also. *NLRB v. Bell Aerospace Co.*, 416 U.S. at 275 (*citing Red Lion Broadcasting v. FCC*, 395 U.S. at 380-81; *FHA v. Darlington, Inc.*, 358 U.S. 84, 90 (1958)). Implicit in the legislative history of the amended Communications Act creating the lottery statute, is Congressional intent demonstrating the

FCC's original statutory mandate to achieve diversity of programming.

Failure of Congress to modify the FCC distress sale policy, coupled with it having conducted its own studies and hearings on minority ownership, demonstrates that Congress was clearly aware of the challenge to the policy in the public arena and in the federal court. These facts, alone, make out an unusually strong case of legislative acquiescence in and ratification by implication of the distress sale policy.

In the case *sub judice*, the Court is not presented with an ordinary claim of legislative acquiescence. The nonaction in the case *sub judice* is important. Since 1983, the FCC's minority ownership policy, including the provision for distress sales, has been the focus of debate of Congressional hearings and the subject of litigation in the D.C. Circuit. *See* above-referenced hearings; and *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985); *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), *vacated and reh'g. en banc granted*, Order of Oct. 31, 1985, *remanded*, Order of Oct. 9, 1986. It is inconceivable that Congress was not acutely aware of what was going on. In view of its prolonged and acute awareness of so important an issue, Congress' choice not to act to modify the distress sale policy provides added support for concluding that Congress was satisfied with the FCC's use of its enforcement power through the distress sale policy to achieve diversity through minority ownership. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379-82 (1982); *Haig v. Agee*, 435 U.S. 280, 300-01 (1981); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-86 (1983); *United States v. Rutherford*,

442 U.S. 554, n.10 (1979). It is a well-settled maxim in statutory construction that, while "it may not always be realistic to infer approval of an . . . administrative interpretation from Congressional silence alone . . . once an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 487-89 (1940) (citations omitted). *See United States v. Bergh*, 352 U.S. 40, 46-47 (1956). The issue presented in the instant case plainly has not escaped public or legislative notice. Therefore, in the face of Congress' extensive knowledge of the FCC's distress sale policy, illustrated by the above-referenced Congressional hearings and the legislative history accompanying the lottery statute,[7] the Court should be amply persuaded that Congress adopted and ratified the distress sale policy.

This is plainly a case in which "the intent of Congress is clear [and] the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 842-43. Any remaining doubt as to Congress' approval of the

---

[7] Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414, n.8 (1975); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951); *National Lead Co. v. United States*, 252 U.S. 140, 147 (1920); 2A C. Sands, *Sutherland on Statutory Construction*, Sec. 49.09 and cases cited (4th ed. 1973).

minority ownership policy, and in particular, the distress sale policy, was removed on December 22, 1987, when the President signed into law House Joint Resolution 395.[8] The Continuing Resolution read, in pertinent part:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended, 32 R.R. 2d [1301] (1982) and Mid-Florida Television Corp., [69] F.C.C.2d 607 Rev. Bd. (1978) which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.[9]

The Senate Report accompanying the Continuing Resolution provides further legislative history to support the FCC's minority ownership policy as an ac-

[8] Making Further Continuing Appropriations for Fiscal Year 1988 and for Other Purposes, Pub.L. 100-202, 101 Stat. 1329 (1987) (162a).

[9] The Commission ordered MM Docket No. 86-484 terminated, pursuant to the legislative mandate. 3 FCC 2d 776 (1988).

ceptable means to meet the administrative agency's public interest mandate. It reads:

> The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences. In approving a lottery system for the selection of certain broadcast licensees, the Congress explicitly approved the use of preferences to promote minority and women ownership. See 47 U.S.C. section 309(i)(3)(A) and H.R. Conf. Rep. No. 765, 87th Cong., 2d Sess. 37-44 (1982).

S. Rep. No. 110-182, 100th Cong., 1st Sess. 76 (1987).[10]

In 1987, The Congressional Research Service analyzed data collected by the FCC to examine the merit of the assumption that a link existed between minority ownership and programming. The inquiry was subsequently terminated in compliance with a Congressional mandate expressed in the Continuing Resolution, *infra*. Based on the data collected, however, the CRS concluded that "there is a strong indication that minority and women station ownership results in a greater degree of minority programming." *See* "Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus?"

[10] Congress has since twice reenacted a similar ban on disturbing the distress sale policy and the FCC's other minority preference policies, through fiscal 1989 and fiscal 1990. Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988) (163a); Pub. L. No. 101-162, 103 Stat. 1020-1021.

Congressional Research Service, Economics Division, June 29, 1988.

The minority ownership policy was prepared by the agency charged with the duty of enforcing the Communications Act. There is ample evidence that the policy so established is a reasonable balance between achieving diversity of the media through increased minority ownership and harms neither the letter nor spirit of the provisions construed and therefore should not be disturbed. In other words, the FCC's distress sale policy, coupled with its enforcement authority, is a rational means to achieve diversity to appropriately increase commercial speech in the marketplace.

"To the external aids that are drawn from history and analogy and administrative practice, there is to be added another [aid] that may be said to be internal, the aid to be derived from the wording of related sections," in ascertaining Congressional intent. *See Norwegian Nitrogen Co. v. United States*, 288 U.S. at 315. In the same Communications Act that speaks of the FCC's public interest mandate is the amended section creating a lottery, but directing that minority enhancements for minority applicants be incorporated into any random selection licensing scheme. *See* Communications Amendments Act of 1982, Pub.L.No. 97-259, 96 Stat. 1087, 1094-95, codified at 47 U.S.C. sections 309(i)(3)(A) and (C)(ii). In enacting the lottery statute, Congress implicitly removed some of the vagueness behind the meaning of the public interest mandate under which the FCC operates. Stated differently, the lottery statute implicitly suggests that Congress sanctioned the FCC practice of using its enforcement authority to achieve diversity of programming through increased minority ownership. *Cf.*

Norwegian Nitrogen Co. v. United States, 288 U.S. at 316 (There are times when the obscurity of one section as contrasted with the clearness of another may be ascribed to inattention).

In summary, Congressional approval of the minority ownership policy, and in particular the distress sale provision, is clear and evidenced by: (1) a series of Congressional hearings held on minority ownership in telecommunications; (2) the legislative history accompanying the lottery statute; (3) a Continuing Resolution mandating the continuance of the minority ownership policy, which was signed by the President; (4) a CRS study validating the underlying rationale of the agency's determination that a nexus exists between diversity of programming and minority ownership; and (5) legislative acquiescence in and ratification by implication of the distress sale policy, of which Congress has been acutely aware. Therefore, the Court should defer to how the agency has construed its public interest mandate and the means chosen to meet its statutory obligation, to wit, the agency's enforcement power is used to achieve diversity of programming through minority ownership and in furtherance of the First Amendment. *Associated Press*, 326 U.S. at 20.

IV. THE APPLICATION OF THE DISTRESS SALE POLICY IS REASONABLE AND CONSTITUTIONALLY PERMISSIBLE BECAUSE IT BENEFITS NON-MINORITIES AND DOES NOT TRAMMEL ON THEIR INTEREST, OR UNDULY ON RESPONDENT

Respondent prevailed in the court below basically because the court determined that the FCC's distress sale policy causes non-minorities to "shoulder an excessive burden" by depriving them of the opportunity

to own a broadcast station. *Shurberg Broadcasting, of Hartford, Inc. v. FCC*, 876 F.2d at 917.

Amicus submits that the conclusion reached by the court below mischaracterizes the distress sale policy solely as a pro-minority policy and places its blinders on with regard to the pro-majority benefit to a class of people to which Respondent belongs. Respondent's claim of discrimination is inconclusive because the distress sale policy, which becomes operative only in an enforcement proceeding, has, in the main, financially benefitted, non-minority licensees, and therefore, must be considered equally a pro-majority policy.[11]

---

[11] That the benefit of the distress sale policy directly favors non-minorities can be deduced from the dearth of minority broadcasters in the broadcast services. Today, there are approximately 11,000 broadcast radio and television licensees, barely 2 percent that are minority-owned or controlled. Since 1978, the year that the distress sale policy was adopted, thirty-eight (38) distress sales arising out of enforcement proceedings have been granted. Amicus is unaware of any *assignor minority licensee* who has benefitted from any of the 38 distress sales under the FCC's enforcement policy. Clearly, the FCC's distress sale policy, when adopted and as implemented, has benefitted equally majority licensees on the enforcement side to which the distress sale policy is tied.

The FCC does not officially maintain a list of minority owned stations, however, the percentage of minority owned stations has not changed significantly since 1986. In 1986 there were "1,181 television stations in America. . . and. . . 9,512" AM and FM radio stations. In both categories combined, minorities owned barely two percent of the total, and so it is today. *See* J. C. Smith, Jr., "Telecommunications And Black Americans: The Unmeasured And Untold Marketplace Factor," Paper Before the Fifteenth Annual Communications Conference, School of Communications, Howard University, at 6-7, Feb. 13, 1986. From its inception, the distress sale policy was instrumental in increasing the number of minority owners, albeit modestly. J. C. Smith, Jr., "The Dearth of Minority Voices In The Information Mix," Paper Before National Black Media Coalition, Eighth Annual Media Conference 10, Oct. 8, 1981. *See* generally, Wilson, "Minority and Gender Diversity in the Broadcast Marketplace," 40 *Fed. Comm. L. J.* 89 (1988). A month before the 1981 NBMC Conference FCC Chairman Mark Fowler had declared, "we at the FCC. . . will not. . . turn back the gains made by minorities in this country. . . will not frustrate the gains made by minorities in telecommunications. . . . " *FCC Release*, No. 003550, at 3 (Sept. 24, 1981).

Whether the FCC has turned back the gains made by minorities in the past decade is subject to debate. However, it is not arguable that minority ownership did not increase significantly. The 11,000 broadcast licenses currently reported by the FCC remain unmistakenly non-minority. See *FCC New Release*, No. 0025 (Oct. 4, 1989).

During a recent hearing on minority ownership of broadcast stations by the Subcommittee on Communications, of the Senate Committee on Commerce, Science and Transportation, the dual purpose of the distress sale policy coupled with the FCC's enforcement authority was explained as follows:

> The distress sale policy grew out of a dual, not a singular, but a dual recognition by the FCC that it could affect greater diversity in the marketplace through a distress sale policy tied to its enforcement authority. This mixed objective was thought to be well within the public interest mandate prescribed by the Congress in 1934, the year that Congress enacted the Communications Act.
>
> Hence, from its inception, one of the dual objectives of the distress sale policy was to provide direct relief to non-minorities.

Now, how did this policy directly aid non-minorities? The policy allowed the non-minority to exit his or her existing broadcast business without costly hearing and permitted the non-minority licensee to salvage 75 percent or less of the fair market value in the sale of their broadcast property.

This was a significant economically beneficial policy for non-minorities because it permitted them to avoid administrative costs by bypassing a revocation hearing and by being able to reap a profit of up to 75 percent or less of fair market value.

In fact, non-minorities affirmatively sought and gained a clarification from the FCC to make the application of the distress sale policy retroactive. A copy of the clarification of distress sale policy, FCC number 78-725, attached to this oral statement is submitted to the record as evidence on nondiscrimination.

I guess, in sum, to sum up quickly, the key of my remarks here is to demonstrate that the claims made in the Shurberg case that are being argued that the distress sale policy discriminated against the non-minorities has substantially been mischaracterized.

The distress sale policy created a dual policy that favors non-minorities and minorities, and is constitutionally permissible.

Minority Ownership of Broadcast Stations: Before Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 101st

Cong., 1st Sess. 139-40. (Testimony of Prof. J. Clay Smith, Jr.)

Hence, licensees, like Respondent, if cited for a rule violation triggering FCC revocation enforcement proceedings, could opt to evoke the distress sale policy to their economic advantage. *See, e.g., Northland Television, Inc.*, 72 FCC 2d 51 (1979); Comment, *FCC Minority Distress Sales Policy Public Interest v. The Public's Interest*, 1981 *Wisc. L. Rev.* 365, 367, n.16. While the court below did not comment at length on the financial benefit to majority licensees and the nexus between the FCC's enforcement policy and the distress sale policy, it did note that the distress sale policy was financially attractive to station owners designated for hearing. *Shurberg Broadcasting of Hartford, Inc.*, 876 F.2d at 904 n.2.

Claims such as the one raised by Respondent have been raised in other contexts, such as when an affirmative action program has benefitted Blacks and Whites as well. *See, e.g., United Steelworkers v. Weber*, 443 U.S. 193, 199 (1978). Complainant in *Steelworkers* claimed discrimination under Title VII of the Civil Rights Act of 1964 because seven Blacks and six Whites were selected for a training program under a collective bargaining agreement. Claimant, the seventh White was excluded because the plan called for only 13 trainees. In the instant case, Respondent, though in a class that could take advantage of the enforcement policy aspect of the distress sale policy, claims that he has been denied equal protection of the law by the same enforcement policy in which he could find sanctuary, if necessary.

A careful review of the FCC's distress sale/enforcement policy demonstrates that it "does not unneces-

sarily trammel the interest of white[s]. . . . ," *id.* at 208, or those of Respondent. The policy does not create a *numerus clausus* - the quota. The number of instances that the distress sale policy has been exercised is *de minimus*. The implementation of the distress sale policy is not automatic because there is no guarantee that a minority can meet the qualifications to become a licensee. This is not a case where a less qualified minority is preferred over a more qualified White. *Id.* at 225 (Rehnquist, J., dissenting). Indeed, it is not even a case where Whites are excluded from co-ownership with minorities, since Whites may have a sizeable interest in the broadcast property, so long as it is less than "a significant minority ownership interest." *1978 Policy Statement*, 68 FCC 2d at 983. This demonstrates that the FCC's distress sale policy is not racially exclusionary. The functional implementation of the distress sale policy points to almost unrestricted joint participation of minorities and non-minorities. Since Whites may have an interest in the broadcast station along with minorities, such co-ownership of interest cannot be termed as "impermissibility of stereotyping." *Shurberg Broadcasting of Hartford, Inc.*, 902 F.2d at 922 (citing *City of Richmond v. Croson*, 109 S. Ct. 706, 733-34 (1989)).

Amicus' argument that the distress sale policy, triggered by the FCC's enforcement process, is driven, in part, by Justice O'Connor's reliance on Professor John Ely's article, "The Constitutionality of Reverse Racial Discrimination," 41 *U. Chi. L. Rev.* 723, 739 (1974), cited with approval in the majority opinion in *City of Richmond v. Croson*, 109 S. Ct. at 722. There, the Court looked to the composition of Richmond's

Black population and its political majority on the Richmond City Council and concluded that in instances where Blacks constitute "a political majority" in decisions adversely affecting Whites "the application of heightened judicial scrutiny" will be used by the Court in its exercise of judicial review. Citing footnote 58 of Professor Ely's article, the Court appears to adopt Ely's language: "Of course it works both ways: a law that favors Blacks over Whites would be suspect if it was enacted by a predominately Black legislature." *Id.* at 739, n.58.

In the case before the Court, the tables are turned and point all too clearly toward an agency enforcement/distress sale policy that has a dual purpose of benefiting Whites and minorities. Thus, Amicus calls the Court's attention to Professor Ely's position that "[w]hen the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself," this does not present a case of invidious discrimination. *Id.* at 735. Because of the importance that the Court attributed to Professor Ely's article in *Croson*, Amicus sets forth in its entirety the language from his article which summons the Court to reverse the case at bar:

> When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being usually suspicious, and, consequently, employing a stringent brand of review, are lacking. A White majority is unlikely to disadvantage itself for reasons of racial prejudice; nor is it likely to be tempted either to underestimate the needs and deserts of Whites relative to those of others, or to overestimate the costs of devising an alter-

native classification that would extend to certain Whites the advantages generally extended to Blacks.

Id.

All of the procedural and substantive acts of the FCC, its enforcement authority and its distress sale policy, amply demonstrate that the members of the FCC, "the control group," did not disadvantage Whites, or Respondent, for reasons of racial prejudice when it adopted the distress sale policy. The FCC devised a policy which advantaged Whites and minorities in such a neutral way that "employing a stringent brand of review, [is] lacking." *Id.* The short of it is that Respondent has not been discriminated against in an invidious manner, nor have White people as a class. They continue *in all respects* to be advantaged by the FCC's enforcement and distress sale policies, and some would advantage them even more. *See Coalition for the Preservation of Hispanic Broadcasting v. FCC*, Nos. 87-1285, et al., Slip op. at 1-12 (D.C. Cir., Jan. 12, 1990) (Williams, J., dissenting). The advantage to Whites is economics on the enforcement side; the advantage to Whites is economics on the minority ownership side. As applied, both policies are reasonable, rational and constitutionally permissible.

CONCLUSION

For the reasons stated in this Brief, The National Bar Association respectfully concludes that Respondent's claim should fail and that the opinion of the court below be reversed *sine mora*.

Respectfully submitted,

Of Counsel

ERROLL D. BROWN, ESQ.
CYNTHIA R. MABRY, ESQ.
LISA C. WILSON, ESQ.

NATIONAL BAR ASSOCIATION
1225 Eleventh Street, N.W.
Washington, D.C. 20001

February 9, 1990

J. CLAY SMITH, JR.

Howard University School of Law
2900 Van Ness Street, N.W.
Washington, D.C. 20008
(202) 686-6559

Counsel of Record for the National Bar Association